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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1564

JAMES JONATHAN MAPP, et al.,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent accepts Petitioners' statement of jurisdiction but cannot accept their statement of the question presented or the statement of the case.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

The questions presented which were correctly resolved by the District Court and the Appellate Court are whether a formerly de jure dual school system is under a continuing annual responsibility to assign its white children throughout the school system in such a manner as to avoid having any schools with a racial balance disproportionate to the system-wide racial balance where such racial disproportion as may then exist in the system "is not the result of any present

or past discrimination upon the part of the Board or other state agency," but "rather is a consequence of demographic and other factors not within any reasonable responsibility of the Board."[1] The District Court and the Court of Appeals answer was in the negative and should be affirmed by a denial of the Petitioners' petition for a writ of certiorari.

The second issue correctly decided by the District Court and the Appellate Court is as follows: whether once a de jure school system has implemented a desegregation plan, as approved by the District Court and the Court of Appeals, with petition having been denied by the United States Supreme Court, is there any Constitutional requirement that additional white students received into the school system through annexation subsequent to the District Court order be dispersed throughout the system in order to achieve a racial balance system-wide? Both the District Court and the Court of Appeals answered this question in the negative and should be affirmed by this court's denial of the Petitioners' petition for writ of certiorari.

The October 20, 1975 2-1 decision of the Court of Appeals affirms the District Court without any qualifications. A petition for rehearing and a suggestion of a rehearing en banc in said case was denied by the Court of Appeals on January 27, 1976. A copy of said opinions appears as *Appendix A* to this brief in opposition.

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[1] *Mapp* v. *Board of Education of Chattanooga*, 329 F.Supp. 1374, 1384 (aff'd 477 F.2d 851) (6th Cir. 1973), cert. denied, 414 U.S. 1022 (1973). As to the Junior High Schools the District Court said:

> "Rather, such limited *racial imbalance* as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or *inaction*, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga Junior High Schools will eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision." (Emphasis added)

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STATEMENT OF THE CASE

The Action Under Review Here

This petition seeks to review a judgment of the District Court in a school desegregation case affirmed by the United States Court of Appeals for the Sixth Circuit, where the District Court refused to order the submission of a new desegregation plan when two high schools remained substantially all-black in spite of affirmative efforts by the Chattanooga Board of Education (hereinafter referred to as CBE) to desegregate said schools and where subsequent and proposed territorial annexation would appear to provide additional white students in the system. Such is the essence of respondent's appeal, Case No. 74-2100, and the Court of Appeals affirmed.

All of the testimony with reference to the subsequent and proposed annexation was introduced by the Petitioners in rebuttal and response to a motion for further relief by CBE requesting amendment of the Amended Desegregation Plan of June 16, 1971. The motion of CBE was the reason for the evidentiary hearing in October of 1973.

The District Court's opinion also refused to allow CBE to amend a previously approved desegregation plan involving decisions based upon race, contiguous busing, pairing, clustering, and racial gerrymandering of zones. The limited amendment was sought by respondent (CBE) in order to receive the Court's permission to implement changes in the desegregation plan designed to diminish the white withdrawal from the system. The Court of Appeals affirmed the District Court, No. 74-2101.

Factual Background

On July 22, 1955, respondent issued its initial statement of policy in response to the decisions of this Court in *Brown* v. *Board of Education of Topeka I*, 347 U.S. 483, and *Brown II*, 349 U.S. 295, decided on May 17, 1954 and May 31, 1954, respectively, on the subject of student desegregation in public

schools. The opening paragraph of said statement read as follows:

> "The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools."[2]

The Board immediately undertook a process of elucidation with the formation of an interracial advisory committee.[3]

The elucidation process was continued until this litigation was filed on April 6, 1960. A gradual desegregation plan was approved in 1962 with 16 selected elementary schools being desegregated in September of that year in grades one, two, and three. All dual zones would have been abolished by 1968. At that point in time all parties presumed such to be compliance with the Constitution.

The pace of the desegregation was accelerated pursuant to District Court order following a motion for further relief by plaintiffs, filed March 29, 1965. The complete elimination of dual zones in all grades was effected by December, 1966. Subsequent to affirmance by the Court of Appeals,[4] the only issue remaining was that of faculty assignments until February of 1971 when the District Court dismissed a motion by Petitioners for summary judgment, but set an evidentiary hearing classifying the issues for trial and placing the burden of proof upon Respondent to prove that the actions taken by Respondent met the obligation to establish a unitary school system.

Shortly after this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (4/20/71) in May, the evidentiary hearing was completed and a new desegregation plan was ordered to "maximize integration" re-

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[2] The complete text of this statement appears as *Appendix C* in a petition filed by CBE with this Court on January 29, 1975, No. 75-1077.

[3] Said statement appears as *Appendix D* in petition No. 75-1077.

[4] 373 F.2d 75 (1967).

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quiring for the first time decisions based upon race for the purpose of achieving an adequate constitutional remedy.[5]

Initial and partial implementation of the 1971 desegregation plan began in September of 1971 under the supervision of the District Court.

Petitioners took an appeal from this decision on the basis that the deviations from a racial balance in the approved plan were unacceptable and unconstitutional. A cross appeal was taken by CBE contending that remedial measures permitted by this Court in *Swann* were permissible, not required, and only in a school system found to be in default of its constitutional obligation; and that CBE was not in default. CBE further contended that the District Court opinion in its reference to maximizing integration read the racial balance language in *Swann* as being constitutionally mandatory and not merely "a starting point."

In a 2-1 Appellate Court decision rendered on October 11, 1972 the case was remanded to the District Court. Following a motion for rehearing and suggestion of rehearing en banc by petitioners, a rehearing en banc was granted with oral argument taking place on December 14, 1972. On April 30, 1973, 477 F.2d 851, an en banc decision of the Court of Appeals reversed the 2-1 decision and affirmed the District Court's opinion.[6]

In the summer of 1973 and as a result of the experience of two years under the amended desegregation plan, CBE, having experienced substantial withdrawal of white students from the system, conducted a careful evaluation of the system and particularly the possible causes of the withdrawal from the schools. The 1971 amended desegregation plan had not been fully implemented in the elementary and junior high schools

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[5] 329 F.Supp. 1374 (1971).

[6] 477 F.2d 851, with Judges Weick and O'Sullivan dissenting and with a separate concurrence by Judge Miller.

during the two years experience under examination. CBE also made a projection of the possible impact upon the system of additional busing projected for full implementation of the plan. Recognizing the possible constitutional obligation upon a board to avoid inaction which might later be alleged to have contributed to student resegregation, CBE, on July 20, 1973, filed a Motion for Further Relief: to Adjust Amended Plan of Desegregation, as filed June 16, 1971. An extended evidentiary hearing was held in Octber of 1973 in which the actual experience of CBE in September of 1971, September 1972, and September 1973 was presented to the District Court, as well as CBE's plan for attempting to counter the white student withdrawal as reflected by the statistical data for the three years in question.

In rebuttal, Petitioners offered testimony with reference to the probable impact of the completion of annexation (then imminent) of certain areas contiguous to the Chattanooga system with said areas being populated predominately by white students.

CBE's motion to amend the plan was denied in an opinion entered on November 16, 1973. Such opinion provided specific guidelines to CBE as to the creation of zones with reference to annexed schools, the adjustment of zones within the system, and further providing that any such creation or adjustment of zones would be required to be submitted to the federal court 30 days prior to their effective date.

On December 26, 1973, Petitioners filed a motion to amend the memorandum opinion of November 16, 1973 and for a new trial and further relief. Said motion was supplemented with an amendment on January 7, 1974. Said motion was denied by the District Court on June 20, 1974 and subsequent thereto on July 12, 1974 Petitioners filed a notice of appeal requesting a complete new desegregation plan for the Chattanooga system. Subsequent thereto on July 22, CBE filed a cross appeal with reference to the District Court's denial of its

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motion to amend the plan. Both cases were docketed in the Appellate Court on September 30, 1974.[7]

The appellate oral argument was held on April 18, 1975 resulting in a 2-1 decision affirming the District Court without qualifications, said opinion being filed on October 20, 1975.[8] Thereafter, the Petitioners filed "Motion for Rehearing or Rehearing en banc" on November 4, 1975 followed by an "Amended Petition for Rehearing and Suggestion of Rehearing en banc" on November 21, 1975, pursuant to a grant of extension in time in which to file said amendment, having been noted on November 4, 1975.

In the interim between the filing of the original motion for rehearing and the filing of the petition for rehearing, this Court granted certiorari in the case of *Pasadena City Board of Education, et al.* v. *Nancy Anne Spangler, et al.* and *United States of America,* No. 75-164, on November 11, 1975.

In the amended petition of November 21, 1975 Petitioners brought to the attention of the Court of Appeals the second question presented in the petition for writ of certiorari filed on behalf of the Pasadena City Board of Education which read as follows:

> "2) Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which it is in no way responsible? Id., at 3271."

The Petitioners went on to suggest that this Court's decision in *Spangler* might clarify the language of *Swann* with respect to the need for "year to year adjustments" and provide guidance to the Court of Appeals in re-evaluating its decision in the *Chattanooga* case. In the conclusion to their petition of No-

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[7] For a more complete statement of the facts from July, 1955 forward, see *Appendix E* to CBE's petition before this Court, No. 75-1077.

[8] Pages 8(a) through 27(a) inclusive in Petitioners' Appendix and pages 1(a) through 17(a) of Respondent's petition in No. 75-1077.

vember 21, 1975, Petitioners went on to request that any action upon their motion for rehearing be stayed, pending this Court's decision in *Spangler, supra.*

Upon receiving notification on November 11, 1975 of the action of this Court in granting certiorari in *Spangler,* CBE's counsel requested and received a copy of the petition for writ of certiorari as filed on behalf of the Pasadena School Board. Following an analysis of this petition, CBE sought and received permission from counsel in the *Spangler* case to file an amicus curiae brief in that case. The brief was filed in the last week of December 1975.

On January 27, 1976 an order by the Appellate Court was filed denying Petitioners' petition for a rehearing.[9]

The next day, Wednesday, January 28, 1976, a petition by CBE seeking a writ of certiorari to review the judgment of the United States District Court, Eastern District of Tennessee, Southern Division, made and entered into this case pursuant to the memorandum opinion of November 16, 1973, and/or the affirmance of said opinion of the District Court affirmed by the United States District Court of Appeals for the Sixth Circuit on October 20, 1975, was placed in the mail from Cincinnati, Ohio directed to the Clerk of the United States Supreme Court.

On the following day, Thursday, January 29, CBE received in the United States mail its first notice of the action of the United States Court of Appeals for the Sixth Circuit in the form of a copy of an order denying the petition for rehearing of plaintiffs-appellants, James Jonathan Mapp, et al, in No. 74-2100, as filed on Tuesday, January 27. Said petition by CBE was received and filed by the Clerk of this Court on Friday, January 30.

Petitioners herein did not respond to said petition by CBE. On Saturday, April 17, 1976, counsel for CBE received a copy of a letter addressed to counsel for Petitioners herein from the clerk of this court dated April 14, 1976, indicating this Court's

[9] Pages 28(a), 29(a) Petitioners' Appendix, and pages 18a, 19a of Respondent's Appendix hereto.

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request that Petitioners herein respond to the January 30, 1976 petition by CBE, No. 75-1077.

Subsequent thereto on Monday, April 26, 1976, this petition was filed with the Clerk of this Court and counsel for CBE received a copy thereof on April 28, 1976.

There are numerous inaccuracies reflected in the statement of the case by Petitioners. Illustrative is the reference on page three referring to the District Court order of February 4, 1972 approving the Board's plan to establish a system-wide vocational technical high school. The record will indicate that CBE has maintained a system-wide vocational technical high school since 1966. In fact, counsel for Petitioners excluded consideration of the Kirkman Technical School from the scope of the desegregation plan by a statement in open court during the initial part of the hearing in 1971.

The initial appeal from the decision of November 16, 1973 was that of the Petitioners after the District Court Judge denied their motion to amend said order and for a new trial and/or further relief. It was subsequent to and as a result of this action by Petitioners that the decision was made by CBE to cross appeal from that part of the District Court opinion denying their request for permission to amend its plan.

A further inaccuracy is reflected on page six where it is indicated that the four high schools would be "utilized fully for academic programs." All of the high schools have other than academic programs and the change was to make the programs in all four high schools substantially similar with regard to their educational content including the nonacademic area.

In 1971 the Board's projections with reference to the affirmative action to desegregate Riverside and Howard were in no part dependent upon current proposals for elementary and junior high school facilities. The initial projections were based upon students actually in the 9th grade, the 10th grade, and the 11th grade in the zones as redrawn at the direction of the Court.

An examination of *Exhibit B* would indicate that the following references on page seven were inaccurate:

> "Since the plan was not implemented in any meaningful sense in September 1971, . . ."
>
> "No implementation of elementary provisions of the Board's 1971 plan had occurred by the start of the 1972-73 academic year."

On page nine and ten the Petitioners state:

> "It also approved the Board's proposal to assign students from the newly annexed areas to over 80% white facilities."

The proposal to the District Court by CBE in October 1973 did not include any proposals with reference to student assignment in newly annexed areas subsequent to the hearing.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision of the Court of Appeals is consistent completely with applicable decisions of this Court in *Brown I* and *II* and its progeny, particularly *Swann*.

Demographic changes and other changes within a school system, subsequent to district court approval of an amended plan of desegregation, when not caused either directly or indirectly by such school system's action or inaction, have no relevance to the affirmative desegregation constitutional duty of the school system even though undesirable racial proportions in schools in the system are the result.

The argument of the Petitioners ignores cause. They construe the constitution to require a school board to act affirmatively to eradicate racial segregation no matter what caused the racial segregation; and when their own statement of their interpretation of the Constitution is limited to "state-imposed segregation."[10]

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[10] Petition, p. 14.

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And further as primary support for such a constitutional conclusion, Petitioners proceed immediately to quote from this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Such quotation utilizes "state-enforced discrimination" and "state-imposed segregation" indicating with unquestioned clarity that this Court was not in any manner directing its attention to racial segregation caused by other than state action.

If the Petitioners' constitutional interpretation is accepted, all of the states of the Union must then assume, as a constitutional duty, the affirmative obligation to act to remove all racial segregation which may exist in the future, without any consideration of cause. This Court has not so construed the Fourteenth Amendment. *Brown I* and *II* were concerned solely with complete school segregation created solely by the state.[11]

Mr. Justice Brennan's unanimous opinion in *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968), the repeated references to "state-imposed segregation" made it clear that this Court was not addressing its attention to racial segregation no matter what its cause.[12] *Swann, supra,*

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[11] "In each instance they have been denied admission to schools attended by white children under laws *requiring* or permitting segregation according to race." *Brown I*, pp. 487-8. (Emphasis added)

[12] *Green, supra,* included the following:

". . . the State acting through the local school board and school officials, organized and operated a dual system, . . ." page 435.

". . . in the context of the State-imposed segregated pattern . . ." page 432.

". . . then operating State-compelled dual systems . . ." page 432.

". . . toward disestablishing State-imposed segregation." page 439.

". . . for dismantling the State-imposed dual system . . ." page 439.

". . . and the Court should retain jurisdiction until it is clear that State-imposed segregation has been completely removed." page 439.

"A desegregation program to effectuate conversion of a State-imposed dual system to a unitary, non-racial system . . ." page 441.

was completely consistent with this constitutional concept re-enforcing it with eight or more direct references, in a manner such as to permit no suggestion of ambiguity.[13]

Petitioners' theory is then supported by wholly inaccurate references to the racial changes since 1971 in an effort to convince this Court that defendant CBE has somehow misled the District Court and the Appellate Court by submitting a paper plan and then failing to implement such plan.

The pace and the scope of racial desegregation in the Chattanooga School System (CSS) is reflected in the eight pages of *Exhibit B* to this opposition brief. Such is only a minute portion of the statistical facts submitted to the District Court during the evidentiary hearing in October of 1973.[14]

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[13] "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of Federal Courts under this Court's mandates to eliminate racially separate schools *established and maintained by state action.*" (Emphasis added) *Swann*, supra, p. 5.

". . . state-imposed segregation by race in public schools denies equal protection of the laws." p. 11

". . . where dual school systems had historically been maintained by operation of state laws." Such is followed by a quote from *Green* which includes the term 'state-imposed segregation.' p. 13

". . . the massive problem of converting from the state-enforced discrimination . . ." p. 14

". . . to eliminate from the public schools all vestiges of state-imposed segregation . . ." p. 15

". . . the responsibilities of school authorities in desegregating a state-enforced dual school system . . ." p. 18

". . . a potent weapon for creating or maintaining a state-segregated school system . . ." p. 21

[14] Exhibit No. 3, Book entitled, "Chattanooga Public Schools, Chattanooga, Tennessee, Attendance Zones. Pupil Enrollment Data, Part III, Summary Analysis of Enrollment Experience, Black-White Ratio Stability" introduced as evidence (with a copy handed to local counsel, Mr. Williams) on October 3, 1973, Volume I, page 148 of the trial transcript. Such data was prepared from school system summary reports Form OS/CR 102, entitled "Elementary and Secondary School Civil

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Petitioners represent to this Court (p. 15) that "By the end of the 1972-73 academic year, however, little of the 1971 desegregation plan had advanced beyond the drawing board." (It should be remembered that dual zones had been entirely disestablished in this system in 1966.) Twenty-three (23) of the twenty-nine (29) elementary schools were then desegregated. One all-black elementary school, Avondale, had shifted from all-white in 1962-63, to all-black in 1971-72 *without any action* upon the part of CBE. Bell, Donaldson, Pineville, Piney Woods, and Trotter had not been desegregated because of the lack of transportation needed to implement the 1971 amended plan. East Lake, Highland Park, Howard, Normal Park, Orchard Knob, Pineville and Smith were not substantially desegregated because of the same reason. However, such implementation was ordered by the District Court's opinion of November 16, 1973, which is the subject of this appeal. Since such final compliance transpired subsequent to the October 1973 hearing, these facts are not in the record on appeal as it was fully implemented in January-February of 1974. The statistical and other evidence of such implementation is now a part of the District Court record as an exhibit to an affidavit of the School Superintendent, Dr. James W. Henry, filed on August 2, 1974. Such facts were made available to the Court of Appeals prior to or during the oral argument of April 18, 1975.

The tone and detail of the Petitioners' argument is designed to convince this Court that CBE has somehow hoodwinked both the District and the Appellate Court. The facts reflected in *Exhibit B* considered alone negate any such conclusion or inference. The respondent suggests that judicial notice of these facts is necessary for the Court's evaluation of factual inaccuracies which appear throughout the petition.

In the first full paragraph on page 16, the petition com-

Rights Survey" filed each year by CBE as required under Title VI of the Civil Rights Act of 1964, U.S. Department of Health, Education and Welfare, Office of Civil Rights, Washington, D. C.

plains that the action of the District Court Judge characterizes "the situation as one in which a . . . plan . . . had been implemented fully . . ." The record is that the District Court in 1973 ordered full implementation of the elementary and junior high schools but recognized that the high school part of the plan had been fully implemented by the introduction of zoning at the high school level.[15] Freedom of choice for the high schools only had been in effect since 1966 since the dual zones had been abolished. The three formerly all-white high schools had been substantially desegregated voluntarily by 1971. (See *Exhibit B*, p. 27a).

The dissent at the Appellate level confirms the above analysis with reference to elementary and junior high schools with the opening sentence of his dissent from the denial of the petition to rehear:

> "Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court, and the United States District Court, proceeded *to bring its grade schools and junior high schools into compliance with the Constitution of the United States,* as to two of its high schools it has signally failed to do so." (emphasis added)

Petitioners confusion is further reflected on page 18 where it states that the Court of Appeals, ". . . operated on the incorrect assumption that the 1971 (high school) provisions had been fully implemented in September of 1971." Such was a fact, and not an incorrect assumption, evident from the record, not challenged in the trial court.[16] The plan did not

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[15] *Mapp* v. *Board of Education*, 366 F.Supp. 1257 (1973) p. 1261:

> "It further appears from the testimony given upon the recent trial of this cause that the defendants are prepared to promptly effect implementation of the final school desegregation plan herein approved. Such implementation shall be effected no later than the commencement of the midyear school semester."

[16] p. 27a of *Appendix B*, hereto.

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produce its desired result as to high schools, but such was not due to failure to implement, but for other reasons beyond the control of CBE and so found to be a fact by the District Court; a fact found by the Court of Appeals not to be clearly erroneous.[17]

The allegation that CBE has immunized its system "from effecting any meaningful desegregation" is in stark contrast to the results. So is the charge that it pursued "every tactical advantage to postpone the day when its implementation is actually required." (p. 19)

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[17] pp. 5a, 6a of Appendix A hereto:

> Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294 (1955) (*Brown II*) and more particularly of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:
>
> > "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disportionate racial concentrations in some schools."
> >
> > *Swann* v. *Board of Education, supra*, 402 U.S. at 23

CONCLUSION

For the foregoing reasons it is respectfully submitted: (1) that the petition should be denied and that a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should not issue in case No. 74-2100, Petitioners' appeal to the Appellate Court; and (2) as the petition by CBE to this Court, No. 75-1077, requests an affirmance of the Appellate Court decision and that of the District Court, that the petition of CBE No. 75-1077, also be denied, including No. 74-2101.

Respectfully submitted,

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Date: May 13, 1976

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APPENDIX A

Nos. 74-2100 and 74-2101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants (74-2100),
Plaintiffs-Appellees (74-2101),

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,
Defendants-Appellees (74-2100),
Defendants-Appellants (74-2101).

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 20, 1975.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which WEICK, Circuit Judge, joined. EDWARDS, Circuit Judge (pp. 7a-17a), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed imple-

[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga*, 295 F. 2d 617 (6th Cir. 1961), 319 F. 2d 571 (6th Cir. 1963), 373 F. 2d 75 (6th Cir. 1967), 477 F. 2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022.

mentation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga*, 477 F. 2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

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When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High School	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white students in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including

> the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 opinion:

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"The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over 'white flight', as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners,* 391 U.S. 450 . . . :

> "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them.'" *Brown II* at 300, . . .

"Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required, *Wright* v. *Council of City of Emporia,* 407 U.S. 451 . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II,* 349 U.S. 294 (1955) *(Brown II)* and more particularly of *Swann* v. *Charlotte-Mecklinburg of Education,* 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet

another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra,* 402 U.S. at 23

Affirmed.

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EDWARDS, Circuit Judge, dissenting. This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The en banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973)) constituted unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga*, 329 F. Supp. 1374 (E.D. Tenn. 1971); *Mapp.* v. *Board of Education of the City of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally

clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly non-discriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1218 students, of which 129 were black and 1089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1646 students, with a racial composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.

While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school sys-

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tem was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. The freedom of choice plan "having failed to undo segregation • • • freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of Davis v. Board of School Commissioners of Mobile, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied it. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial pro-

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ceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were non-resident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to

> whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.
>
> *Mapp* v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and holding that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

> The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.
>
> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final

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> approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.
>
> *Mapp* v. *Board of Education of the City of Chattanooga*, 366 F. Supp. 1257, 1260-61 (E.D. Tenn. 1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968).

Defendant-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra*:

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The

Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra,* at 7; *Bradley* v. *School Board,* 382 U.S. 103; cf. *Watson* v. *City of Memphis,* 373 U.S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminnate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U. S. 145, 154. Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241;

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> In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U.S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board,* 377 U.S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education,* 373 U.S. 683, 689. See *Calhoun* v. *Latimer,* 377 U.S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*
>
> *Green* v. *County School Board of New Kent County, supra* at 437-39.

At the outset we note that we deal with a school district which at the time of the beginning of this litigation was clearly and concededly a dual school system segregated by race according to state statute. We therefore are required to determine whether or not a public school system (racially constituted during the 1973-74 school year as follows) can be held by this court to have been desegregated "root and branch":

United States v. *Crescent Amusement Co.,* 323 U. S. 173; *Standard Oil Co.* v. *United States,* 221 U. S. 1. See also *Griffin* v. *County School Board,* 377 U. S. 218, 232-234.

	White	Black	% White	% Black
Howard	10	999	1	99
Riverside	3	721	1	99
Chattanooga	439	330	57	43
Brainerd	646	404	61	39

There can, of course, be no doubt that Howard and Riverside High Schools are "racially separate public schools established and maintained by state action." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5 (1971). Both were built as Negro schools under state law which required a dual school system. T.C.A. §§ 2377, 2393.9 (Williams 1934). Twenty-one years after decision of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), both high schools (encompassing 60% of the black high school population of Chattanooga) are still (and always have been) essentially 100% black. As to these schools and students, there has been no desegregation at all.

Defendants-Appellees contend that two measures which they took should be accepted as the equivalent of desegregation. They are: 1) the inauguration of a freedom of choice plan, and 2) a change in zone boundaries which was calculated (it is claimed) to introduce 25% of white students into both high schools. Defendants-appellees freely admit that neither measure was effective in changing the segregated character of the Howard and Riverside High Schools.

At to the freedom of choice plans, the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact. *See Green* v. *County School Board of New Kent County, supra; Monroe* v. *Board of Commissioners of the City of Jackson,* 391 U.S. 450 (1968).

Defendants-appellees' strongest reliance is upon the second contention that they "zoned" 25% white students into Howard and Riverside but that the white students thus assigned avoided the assignment by "white-flight." As to this measure, we have

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no findings of fact concerning defendants-appellees' contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 15-21; *Brinkman* v. *Gilligan,* — F.2d — (6th Cir. 1975) (Decided June 24, 1975, No. 75-1410).

In my judgment the case should be affirmed as to the grade schools and junior high schools. The judgment should be vacated and remanded as to the high schools. All other issues presented by either party should be summarily denied.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al.,
Defendants-Appellees.

ORDER

(Filed January 27, 1976)

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard en banc.

Judges Edwards and McCree having requested en banc rehearing for the reasons set forth in Judge Edwards' dissenting opinion, but it appearing to the court that less than a majority of the court has voted in favor thereof, the petition for rehearing was referred to the panel which originally heard the appeal and was determined not to be well taken, Judge Edwards dissenting.

It is therefore ordered that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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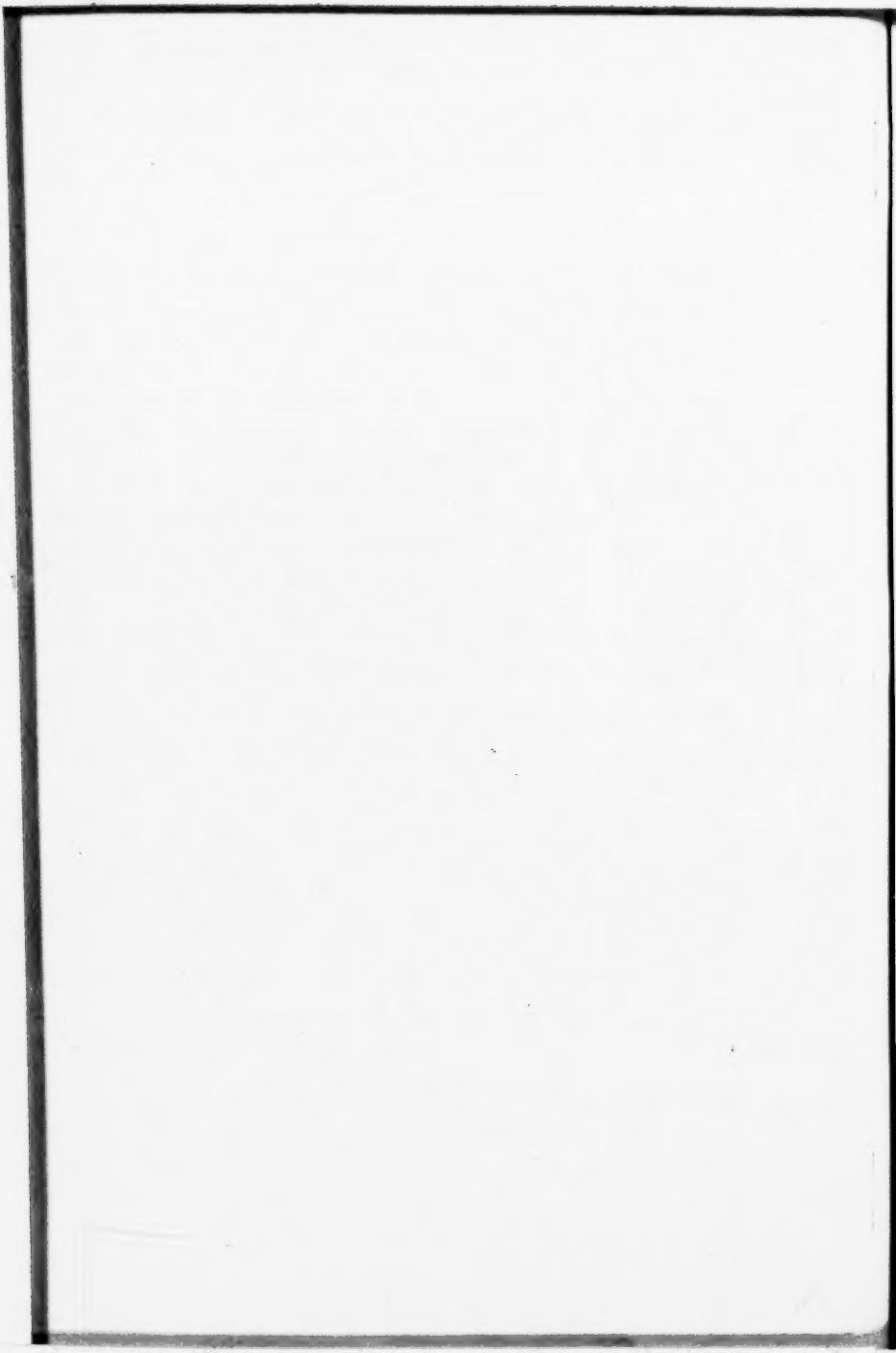
Re: James Jonathan Mapp v.
The Board of Education of the City
of Chattanooga, Tennessee

No. 74-2100

EDWARDS, Circuit Judge, dissenting. Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court of the United States, this court, and the United States District Court, proceeded to bring both its grade schools and junior high schools into compliance with the Constitution of the United States, as to two of its high schools it has signally failed to do so. The majority opinion of this court would establish as law the proposition that approximately 60% of the black children of the Chattanooga high school system may be continued forever in complete segregation in all black high schools. The two black high schools at issue were built as such under state law that required a racially dual school system and have been continuously segregated as such down to this very moment.

There can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these schools there has been no desegregation at all. In my judgment it simply cannot be said with any accuracy that the possibilities for successful desegregation have been exhausted. As to these schools the School Board should be required to propose a new and realistic and effective plan to meet its constitutional duty.



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Report #5-A Elementary Schools

CHATTANOOGA PUBLIC SCHOOLS
Chattanooga, Tennessee

COMPARISON OF TENTH DAY PUPIL ENROLLMENT FOR EACH SCHOOL BY YEAR AND BY RACE
FROM 1962-63 TO PRESENT

Elementary Schools

10th Day Enrollment (Resident and Nonresident Pupils)

School Year	Amnicola (1-6)			Avondale (1-6)			Barger (1-6)			Bell (1-6)			Brown (1-6)			Carpenter (1-6)			Chatta. Avenue (1-6)			Cedar Hill (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	---	---	---	0	317	317	0	561	561	622	0	622	0	368	368	501	0	501	524	0	524	0	171	171
** 1963-64	---	---	---	318	170	488	0	543	543	592	0	592	0	332	332	Closed - East Fifth Street			481	0	481	0	148	148
*** 1964-65	---	---	---	639	18	657	0	569	569	573	0	573	1	319	320	---	---	---	372	0	372	0	139	139
**** 1965-66	---	---	---	629	27	656	0	547	547	564	0	564	2	306	308	---	---	---	Closed - Howard Railroad Relocation			0	196	196
***** 1966-67	---	---	---	641	18	659	0	518	518	545	0	545	114	288	402	Opened Middle School			---	---	---	0	210	210
1967-68	---	---	---	648	17	665	0	478	478	576	0	576	112	264	376	373	(1-4) 19	392	---	---	---	0	187	187
1968-69	Annexed from County			683	7	690	0	494	494	574	0	574	125	243	368	331	26	357	---	---	---	0	162	162
1969-70	69	63	132	672	5	677	2	432	434	561	6	567	122	236	358	344	10	354	---	---	---	0	176	176
1970-71	75	35	110	640	1	641	2	453	455	514	9	523	121	216	337	301	8	309	---	---	---	0	174	174
1971-72	Closed-Carpenter and Riverwont			669	0	669	71	(4-6) 258	329	416	2	418	106	205	311	406	(1-6) 46	452	---	---	---	Closed- East Lake		
1972-73	---	---	---	660	0	660	90	(4-6) 222	317	421	2	423	108	210	318	337	27	364	---	---	---	---	---	---
1973-74	---	---	---	629	0	629	93	208	301	380	2	382	101	199	300	310	13	323	---	---	---	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

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Elementary Schools (Continued)

10th Day Enrollment (Resident and Nonresident Pupils)

School Year	Clifton Hills (1-6)			Davenport (1-6)			Donaldson (1-6)			East Chatta. (1-6)			East Fifth (1-6)			East Lake (1-6)			Eastdale (1-6)			Fort Cheatham (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
*1962-63	0	496	496	394	0	394	562	0	562	0	484	484	710	0	710	0	696	696	1	484	485	155	0	155
**1963-64	0	513	513	397	3	400	543	0	543	3	540	543	862	(1-6) 1	863	0	744	744	20	506	526	87	0	87
***1964-65	0	514	514	355	7	362	533	0	533	20	523	543	609	41	650	0	699	699	37	453	490	Closed Nov. 1963 (Freeway)		
****1965-66	0	516	516	354	14	368	536	0	536	21	477	498	603	32	635	0	623	623	51	440	491	---	---	---
*****1966-67	11	518	529	308	16	324	519	0	519	23	465	488	610	24	634	0	601	601	50	444	494	---	---	---
1967-68	19	465	484	284	19	303	502	0	502	16	448	464	208	(5-6) 3	211	1	562	563	71	360	431	---	---	---
1968-69	17	447	464	275	18	293	541	0	541	8	422	430	200	10	210	1	540	541	108	315	423	---	---	---
1969-70	18	446	464	255	9	264	512	0	512	7	410	417	152	4	156	1	470	471	150	261	411	---	---	---
1970-71	17	411	428	234	9	243	471	0	471	12	382	394	146	7	153	3	439	442	234	180	414	---	---	---
1971-72	27	311	338	Closed - Howard Hemlock			462	0	462	41	381	422	---	Closed ---	---	3	530	533	169	(4-6) 170	339	---	---	---
1972-73	39	359	398	---	---	---	437	0	437	91	374	465	---	---	---	2	512	514	244	142	386	---	---	---
1973-74	31	349	380	---	---	---	419	0	419	106	280	386	---	---	---	4	455	459	336	111	447	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Elementary Schools (Continued)

School Year	Garber (1-6)			Glenwood (1-6)			Henry (1-6)			Hemlock (1-6)			Highland Park (1-6)			Howard (1-6)			Long (1-6)			Missionary Ridge (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
	10th Day Enrollment (Resident and Nonresident Pupils)																							
* 1962-63	0	338	338	19	175	194	328	0	328	0	324	324	0	415	415	684	0	684	1	320	321	5	380	385
** 1963-64	0	347	347	60	125	185	285	0	285	0	288	288	0	377	377	662	0	662	3	301	304	5	376	381
*** 1964-65	0	353	353	103	87	190	250	0	250	19	281	300	0	405	405	606	0	606	0	336	336	4	376	380
**** 1965-66	0	396	396	106	63	169	294	0	294	37	262	299	0	414	414	806	2	808	1	358	359	5	374	379
***** 1966-67	1	319	320	130	28	158	336	0	336	54	242	296	0	404	404	783	0	783	5	331	336	6	358	364
1967-68	5	317	322	141	14	155	359	0	359	89	224	313	0	364	364	726	0	726	8	384	392	5	335	340
1968-69	65	253	318	160	17	177	351	1	352	110	204	314	0	378	378	673	0	673	14	449	463	5	330	335
1969-70	155	188	343	208	7	215	408	0	408	83	184	267	0	382	382	636	0	636	29	408	437	7	327	334
1970-71	242	135	377	246	2	248	376	0	376	66	195	261	4	351	355	617	0	617	52	367	419	11	319	330
1971-72	296	91	387	Closed-M. Ridge Ridgedale-0			371	0	371	158	175	333	24	264	288	615	4	619	54	317	371	158	146	304
1972-73	310	49	359	---	---	---	339	0	339	158	159	317	17	233	250	522	4	526	42	279	321	153	92	245
1973-74	343	33	376	---	---	---	298	0	298	142	139	281	24	180	204	466	3	469	55	299	354	159	65	224
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Elementary Schools (Continued)

School Year	Normal Park (1-6)			Oak Grove (1-6)			Orchard Knob (1-6)			Pineville (1-6)			Piney Woods (1-6)			Ridgedale (1-6)			Rivermont (1-6)			Sanderson (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
	10th Day Enrollment (Resident and Nonresident Pupils)																							
* 1962-63	0	552	552	0	444	444	1189	0	1189	---	---	---	---	---	---	0	344	344	---	---	---	145	0	145
** 1963-64	0	531	531	42	430	472	1185	0	1185	---	---	---	Opened January 1964 (New)			7	354	361	---	---	---	164	0	164
*** 1964-65	0	541	541	77	406	483	1048	0	1048	---	---	---	370	0	370	46	368	414	---	---	---	136	3	139
**** 1965-66	0	563	563	72	393	465	1057	0	1057	---	---	---	369	0	369	45	383	428	---	---	---	168	0	168
***** 1966-67	0	574	574	71	354	425	1033	0	1033	---	---	---	365	0	365	76	339	415	---	---	---	154	0	154
1967-68	2	586	588	67	331	398	1018	0	1018	Annexed from County			358	0	358	68	303	371	---	---	---	140	0	140
1968-69	4	565	569	61	328	389	955	0	955	0	131	131	355	4	359	83	270	353	Annexed from County			Closed-Consolidated with Howard, St. Elmo & Donaldson		
1969-70	0	535	535	66	301	367	926	0	926	0	152	152	334	4	338	93	252	345	0	554	554	---	---	---
1970-71	0	535	535	67	257	324	788	3	791	0	153	153	307	1	308	82	252	334	0	561	561	---	---	---
1971-72	2	365	367	71	226	297	731	4	735	0	153	153	277	2	279	92	201	293	73	532	605	---	---	---
1972-73	4	366	370	104	199	303	694	2	696	0	157	157	271	0	271	98	204	302	65	505	570	---	---	---
1973-74	4	406	410	119	180	299	702	1	703	1	174	175	272	0	272	98	188	286	47	455	502	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Elementary Schools (Continued)

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																										
	St. Elmo (1-6)			Smith (1-6)			Spears Avenue (1-6)			Sunnyside (1-6)			Trotter (1-6)			Woodmore (1-6)			Hillcrest (1-6)			Total Elementary (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	6	338	344	601	0	601	99	0	99	14	309	323	555	0	555	0	562	562									
** 1963-64	9	351	360	558	0	558	98	0	98	38	284	322	513	0	513	0	546	546				7115	8078	15193
*** 1964-65	15	344	359	488	0	488	97	0	97	70	298	368	434	0	434	0	549	549				6932	7810	14742
**** 1965-66	17	359	376	443	0	443	100	0	100	72	269	341	431	0	431	0	566	566				6902	7629	14531
***** 1966-67	18	346	364	405	0	405	Closed-Consolidated with Brom			80	286	366	388	0	388	0	538	538				6783	7580	14363
1967-68	19	306	325	404	0	404	---	---	---	102	246	348	347	0	347	0	497	497				6726	7221	13947
1968-69	54	316	370	352	0	352	---	---	---	137	192	329	349	0	349	2	490	492				6668	6729	13397
1969-70	47	294	341	323	0	323	---	---	---	132	202	334	328	0	328	18	505	523				6593	6612	13205
1970-71	54	322	376	297	1	298	---	---	---	134	175	309	311	0	311	22	451	473				6658	6823	13481
1971-72	62	245	307	285	0	285	---	---	---	58	(1-3) 250	308	304	0	304	195	(1-3) 220	415				6446	6404	12850
1972-73	63	245	308	241	1	242	---	---	---	61	(1-3) 209	270	245	0	245	227	(1-3) 173	400				6196	5098	11294
1973-74	67	221	288	224	3	227	---	---	---	53	172	225	230	0	230	248	144	392	Annexed from County 56	374	430	6043	4725	10768
1974-75																						6017	4654	10671
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Report #5-B Junior High Schools

Junior High Schools

10th Day Enrollment (Resident and Nonresident Pupils)

School Year	Alton Park (7-9)			Brainerd (7-9)			Dalewood (7-9)			East Fifth (-)			East Lake (7-9)			East Side (7-9)			Hardy (7-9)			Howard (7-9)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	816	0	816	0	1100	1100	Opened Fall 63-64 (New)			329	0	329	0	637	637	0	610	610	0	611	611	887	0	887
** 1963-64	837	0	837	0	590	590	0	467	467	Closed-Transferred to Riverside			0	605	605	0	559	559	0	546	546	879	0	879
*** 1964-65	905	0	905	0	600	600	0	491	491	---	---	---	0	589	589	0	587	587	0	473	473	853	0	853
**** 1965-66	913	0	913	7	607	614	9	522	531	---	---	---	0	580	580	27	627	654	99	440	539	740	1	741
***** 1966-67	893	0	893	33	649	682	28	579	607	---	---	---	0	621	621	91	618	709	217	356	573	652	0	652
1967-68	888	0	888	53	661	714	37	613	650	339	(7-8) 6	345	1	602	603	112	646	758	331	292	623	619	0	619
1968-69	889	4	893	58	621	679	55	590	645	296	8	304	1	595	596	119	629	748	304	305	609	612	1	613
1969-70	843	7	850	61	565	626	72	542	614	290	1	291	0	565	565	118	606	724	384	268	652	642	0	642
1970-71	835	7	842	67	521	588	105	470	575	243	2	245	1	531	532	130	593	723	426	190	616	622	0	622
1971-72	781	3	784	115	370	485	200	326	526	335	(7-9) 1	336	1	447	448	148	476	624	550	166	716	552	0	552
1972-73	741	2	743	145	306	451	245	219	464	309	(7-9) 1	310	3	438	441	113	389	502	508	139	647	513	0	513
1973-74	655	2	657	157	250	407	348	197	545	279	1	280	1	380	381	126	365	491	505	96	601	473	1	474
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Junior High Schools (Continued)

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																										
	Kirkman (9)			Long (7-9)			Lookout (7-9)			North Chattanooga (7-9)			Orchard Knob (7-9)			Park Place (7-9)			Riverside (7-9)			Total Junior High (7-9)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	0	177	177	0	134	134	0	186	186	0	530	530	762	0	762	247	0	247	---	---	---	3043	3985	7028
** 1963-64	0	165	165	0	118	118	0	165	165	0	589	589	752	0	752	Closed Riverside			850	0	850	3318	3804	7122
*** 1964-65	0	153	153	0	125	125	0	148	148	0	603	603	797	0	797	---	---	---	894	0	894	3449	3769	7218
**** 1965-66	---	Closed ---	---	4	135	139	37	149	186	12	625	637	798	0	798	---	---	---	785	0	785	3431	3686	7117
***** 1966-67	---	---	---	7	134	141	54	156	210	36	581	617	745	0	745	---	---	---	598	2	600	3354	3696	7050
1967-68	---	---	---	10	141	151	71	165	236	54	605	659	696	0	696	---	---	---	181	(9) 0	181	3392	3731	7123
1968-69	---	---	---	33	185	218	77	161	238	61	674	735	675	0	675	---	---	---	184	0	184	3364	3773	7137
1969-70	---	---	---	35	175	210	70	147	217	63	744	807	623	0	623	---	---	---	165	0	165	3366	3620	6986
1970-71	---	---	---	28	165	193	89	148	237	62	723	785	653	0	653	---	---	---	138	0	138	3399	3350	6749
1971-72	---	---	---	21	151	172	84	115	199	57	651	708	493	0	493	---	---	---	Transferred to East Fifth St.			3337	2706	6043
1972-73	---	---	---	28	149	177	83	123	206	63	589	652	457	0	457	---	---	---	---	---	---	3208	2355	5563
1973-74	---	---	---	28	165	193	87	102	189	78	567	645	385	0	385	---	---	---	---	---	---	3122	2126	5248
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Report #5-C Senior High Schools

Senior High Schools

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																									Total Senior High (10-12)		
	Brainerd High (10-12)			Chattanooga High (10-12)			Howard High (10-12)			Kirkman Technical (10-12)			Riverside High (10-12)															
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	0	896	896	0	1059	1059	1580	0	1580	0	989	989	---	---	---											1580	2944	4524
** 1963-64	0	1001	1001	0	1189	1189	1033	0	1033	0	1037	1037	944	0	944											1977	3227	5204
*** 1964-65	0	1070	1070	0	1295	1295	1177	0	1177	0	1051	1051	1111	0	1111											2288	3416	5704
**** 1965-66	0	1103	1103	0	1253	1253	1304	0	1304	0	1080	1080	1260	0	1260											2564	3436	6000
***** 1966-67	26	1085	1111	35	1225	1260	1348	0	1348	1	1057	1058	1389	0	1389											2799	3367	6166
1967-68	54	1089	1143	57	1227	1284	1407	0	1407		1069	1072	1341	1	1342											2862	3386	6248
1968-69	88	1131	1219	66	1264	1330	1427	0	1427	29	1079	1108	1267	0	1267											2877	3474	6351
1969-70	170	1224	1394	83	1359	1442	1415	0	1415	64	1118	1182	1124	0	1124											2856	3701	6557
1970-71	184	1160	1344	141	1294	1435	1313	0	1313	129	1089	1218	1057	1	1058											2824	3544	6368
1971-72	463	933	1396	369	733	1102	1089	44	1133	274	818	1092	693	25	718											2888	2553	5441
1972-73	509	766	1275	394	611	1005	941	7	948	366	761	1127	640	4	644											2850	2149	4999
1973-74	528	639	1167	369	502	871	887	5	892	424	660	1084	615	4	619											2823	1810	4633
1974-75																												
1975-76																												
1976-77																												
1977-78																												
1978-79																												
1979-80																												

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)